Globalmariner Offshore Services Sdn Bhd & Ors v TH Heavy Engineering Bhd (in creditors' voluntary liquidation) & Ors and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24NCC-574–10 OF 2023 AND WA-24NCC-582–10 OF 2023
ONG CHEE KWAN J
29 FEBRUARY 2024

Companies and Corporations — Joint venture ('JV') — Shareholders' agreement ('SHA') — SHA provided that upon one shareholder becoming unable to pay its debts the other shareholder was entitled to issue notice of default and buy over insolvent shareholder's entire shareholding in JV company — Whether notice of default was validly issued as evidence showed insolvent shareholder was truly unable to pay its debts — Whether insolvent shareholder's refusal to sell its shares to other shareholder breached the SHA — Whether amount of damages payable to other shareholder was value of insolvent shareholder's shares as at date of issuance of default notice

The first defendant ('THHE') was in financial distress and decided to venture into the Floating, Production, Storage and Offloading ('FPSO') business to generate income. For that purpose, THHE needed to acquire a FPSO vessel in order to tender for FPSO projects. THHE approached the plaintiff ('GMOS') for advice on the acquisition of such a vessel and on the FPSO business in general. THHE subsequently managed to purchase a partially-converted FPSO vessel ('DP-1') for USD82.5m which was later registered in the name of the second defendant ('Floatech'), which at that time was wholly owned by THHE. GMOS later acquired a 20% shareholding in Floatech and, pursuant to a shareholders' agreement ('SHA') it had with THHE, both THHE and GMOS used Floatech as their joint-venture vehicle to successfully bid for a FPSO project ('the project'). Issues arose between the parties when funding for the conversion of DP-1 for use in the project could not be secured. THHE made several calls upon GMOS to make financial contributions but the latter declined to do so because THHE had not followed the order of priority for obtaining of funds spelt out in cl 3.2(c) of the SHA. Subsequently, when GMOS came to know that third parties had presented winding-up petitions against THHE, it invoked cls 8.6(d) and 8.7(a) of the SHA to issue to THHE a default notice dated 20 July 2016 followed by a default sale notice dated 29July 2016 stating that since THHE had become insolvent and could not pay its debts, it was deemed to have offered all its shares in Floatech for sale to GMOS. THHE refused to comply with the default sale notice, causing GMOS to file the instant suit to compel THHE to specifically perform the SHA.

Alternatively, it sought damages in lieu of specific performance. In response, THHE filed a defence and counterclaim against GMOS and five other parties for misrepresentation, negligent misstatement, negligent advice and breach of fiduciary duties. THHE also alleged that GMOS breached the SHA when it failed to heed THHE's calls to provide financial contributions in the joint-venture exercise. Among other things, THHE sought to declare the default notice and default sale notice invalid and null and void.

Held, awarding GMOS RM288,719,545.45 (the equivalent of USD63,419,999 as at 21 July 2023) as damages in lieu of specific performance and dismissing THHE's counterclaim:

(1) The totality of the evidence showed that at the time of issuance of the default notice, THHE was unable to pay its debts as they fell due. As such, the default notice dated 20 July 2016 was validly issued by GMOS. It consequently followed that the default sale notice dated 29 July 2016 issued by GMOS to THHE under cl 8.7(a) of the SHA was also valid (see paras 56 & 65).

(2) GMOS was entitled to issue the default notice when it became aware of the presentation of winding-up petitions by third parties against THHE. THHE's argument that the petitions were subsequently withdrawn on the implementation of a debt settlement scheme did not mean the trigger event for the issuance of the default notice under cl 8.6(d) of the SHA, namely, THHE's insolvency or inability to pay its debts as they fell due, did not occur. The key consideration in determining the validity of the issuance of the default notice was THHE's state of affairs at the point of issuance of the default notice, namely, 20 July 2016. The implementation of the debt settlement scheme at a later point of time was irrelevant to the state of insolvency as at 20 July 2016 (see paras 58–63).

(3) Upon service of the default sale notice by GMOS, THHE was deemed to have offered its 80% shareholding in Floatech to GMOS in accordance with the formula set out in cl 8.7(a) of the SHA. THHE's refusal to comply with the default sale notice was a breach of the SHA (see paras 66–67).

(4) THHE had failed to prove its counterclaim against the various parties. The counterclaim — which was prima facie unsustainable and which appeared on the face of available evidence to have been filed in bad faith and which resulted in the litigation extending to seven years — was therefore dismissed with an order that THHE pay a total sum of RM1.9m in costs to the various parties it had counterclaimed against (see paras 142 & 153–154).

(5) GMOS was not obliged to contribute to the financing of the project because: (a) the order of priority to obtain funds as prescribed in cl 3.2(c)

of the SHA was not followed by THHE. Even before it had exhausted the option of obtaining funds from financial institutions, THHE called for shareholder financing from GMOS and thereby overrode and breached the order of priority; and (b) until the shareholders had unanimously agreed to the 'approved capital budget' and 'approved operating budget' of Floatech in accordance with cl 5.4 read with Schedule 4 of the SHA — which was not shown to have been done in this case — the obligation of shareholders to contribute to financing in accordance with cl 3.2(e) of the SHA did not arise. Further and in any event, the cash calls made by THHE to GMOS were invalid (see paras 121–128, 130–136 & 139).

(6) Considering the fact that the project contract had been novated to a third party, that DP-1 had been auctioned off and that Floatech had become an insolvent and practically worthless company, granting an order of specific performance would not achieve a just outcome. The appropriate relief for GMOS was damages in substitution of specific performance. Damages had to be calculated by taking into account the reasonable and probable benefit that GMOS would have derived had it been able to purchase THHE's 80% stake in Floatech in July 2016. The court accepted the expert opinion that Floatech's shares were worth about USD79.28m as at the date of the default sale notice; hence, THHE's 80% shareholding as at that date was worth approximately USD63.42m. Applying the formula to determine the purchase price given in cl 8.7(a) of the SHA, the damages representing the loss to GMOS was USD63,419,999 (see paras 143–151).

[Bahasa Malaysia summary

Defendan pertama ('THHE') mempunyai masalah kewangan dan menceburi perniagaan pengeluaran penyimpanan dan pemindahan terapung ('FPSO') untuk menjana pendapatan. Untuk tujuan itu, mereka perlu memperoleh kapal FPSO untuk mendapatkan tender projek FPSO. THHE mendekati plaintif ('GMOS') untuk mendapatkan nasihat mengenai pemerolehan kapal sedemikian dan perniagaan FPSO secara umum. Mereka kemudiannya berjaya membeli kapal FPSO yang separa siap ('DP-1') dengan harga sebanyak USD82.5 juta yang kemudiannya didaftarkan atas nama defendan kedua ('Floatech') yang pada masa itu dimiliki sepenuhnya oleh THHE. GMOS kemudiannya memperoleh 20% pegangan saham dalam Floatech dan menurut perjanjian pemegang saham ('SHA') yang dimilikinya dengan THHE, kedua-dua THHE dan GMOS menggunakan Floatech sebagai vesel usaha sama mereka untuk pembidaan projek FPSO ('projek tersebut'). Isu timbul antara pihak-pihak apabila pembiayaan untuk penukaran DP-1 untuk digunakan dalam projek tersebut tidak dapat diperolehi. THHE membuat beberapa gesaan kepada GMOS untuk penajaan kewangan tetapi GMOS enggan berbuat demikian kerana bukan di dalam keutamaan untuk mendapatkan dana seperti yang dinyatakan dalam klausa 3.2(c) SHA. Selepas

itu, apabila GMOS mengetahui bahawa pihak ketiga telah memfailkan petisyen penggulungan terhadap THHE, mereka menggunakan klausa 8.6(d) dan 8.7(a) SHA untuk mengeluarkan notis keingkaran bertarikh 20 Julai 2016 diikuti dengan notis jualan ingkar bertarikh 29 Julai 2016 yang menyatakan bahawa sejak THHE telah muflis dan tidak dapat membayar hutangnya, ianya dianggap telah menawarkan semua sahamnya dalam Floatech untuk dijual kepada GMOS. THHE enggan mematuhi notis jualan ingkar, menyebabkan GMOS memfailkan saman ini untuk memaksa THHE melaksanakan SHA secara khusus. Sebagai alternatif, mereka menuntut ganti rugi sebagai perlaksanaan spesifik tertentu. Sebagai tindak balas, THHE memfailkan pembelaan dan tuntutan balas terhadap GMOS dan lima pihak lain kerana salah nyata, salah nyata cuai, nasihat cuai dan pelanggaran kewajipan fidusiari. THHE juga mendakwa bahawa GMOS melanggar peruntukan SHA apabila gagal melaksanakan permintaan THHE untuk menaja usaha sama tersebut. Antara lain, THHE memohon untuk mengisytiharkan notis keingkaran dan notis jualan ingkar sebagai tidak sah dan terbatal.

Diputuskan, memberikan GMOS RM288,719,545.45 (bersamaan USD63,419,999 setakat 21 July 2023) sebagai ganti rugi sebagai ganti perlaksanaan spesifik dan mengenepikan tuntutan balas THHE:

(1) Keseluruhan keterangan menunjukkan bahawa pada masa pengeluaran notis keingkaran, mereka tidak dapat membayar hutangnya. Oleh itu, notis keingkaran bertarikh 20 Julai 2016 telah dikeluarkan secara sah oleh GMOS. Oleh itu, notis jualan ingkar bertarikh 29 Julai 2016 yang dikeluarkan oleh GMOS kepada THHE menurut klausa 8.7(a) SHA juga adalah sah (lihat perenggan 56 & 65).

(2) GMOS berhak mengeluarkan notis keingkaran apabila menyedari petisyen penggulungan telah difailkan oleh pihak ketiga terhadap THHE. Oleh itu, hujahan THHE bahawa petisyen itu kemudiannya ditarik balik kerana terdapat penyelesaian hutang tidak bermakna pengeluaran notis keingkaran di bawah klausa 8.6(d) SHA dikeluarkan, iaitu keberhutangan atau ketidakupayaan untuk membayar hutangnya, tidak berlaku. Pertimbangan utama untuk menentukan keesahan pengeluaran notis keingkaran adalah melihat kepada keberhutangan THHE pada masa pengeluaran notis keingkaran iaitu 20 Julai 2016. Penyelesaian hutang pada masa kemudian tidak relevan dengan keadaan keberhutangan pada 20 Julai 2016 (lihat perenggan 58–63).

(3) Setelah penyerahan notis jualan ingkar oleh GMOS, THHE dianggap telah menawarkan 80% pegangan sahamnya dalam Floatech kepada GMOS menurut kiraan yang ditetapkan dalam klausa 8.7(a) SHA. Keengganan THHE untuk mematuhi notis jualan ingkar merupakan pelanggaran SHA (lihat perenggan 66–67).

(4) THHE telah gagal membuktikan tuntutan balasnya terhadap pelbagai

pihak. Tuntutan balas — yang prima facie tidak dapat dikekalkan telah difailkan dengan niat jahat dan yang mengakibatkan litigasi berlangsung selama tujuh tahun — oleh itu ditolak dengan perintah bahawa THHE membayar sejumlah RM1.9 juta kos kepada pelbagai pihak yang terlibat dengan tuntutan balas (lihat perenggan 142 & 153–154).

(5) GMOS tidak diwajibkan untuk menyumbang kepada pembiayaan projek kerana: (a) susunan keutamaan untuk mendapatkan dana seperti yang ditetapkan dalam klausa 3.2(c) SHA tidak diikuti oleh THHE. Malah sebelum kehabisan pilihan untuk mendapatkan dana dari institusi kewangan, THHE memohon pembiayaan pemegang saham daripada GMOS dan melanggar susunan keutamaan; dan (b) sehingga pemegang saham sebulat suara bersetuju dengan 'belanjawan modal yang diluluskan' dan 'belanjawan operasi yang diluluskan' Floatech mengikut klausa 5.4 yang dibaca dengan jadual 4 SHA — dalam kes ini tidak dilakukan — kewajipan pemegang saham untuk menyumbang kepada pembiayaan menurut klausa 3.2(e) SHA tidak timbul. Selanjutnya dalam apa jua keadaan, permintaan pembiayaan oleh THHE kepada GMOS adalah tidak sah (lihat perenggan 121–128, 130–136 & 139).

(6) Mengambil kira fakta bahawa kontrak projek telah dipindahkan kepada pihak ketiga, DP-1 telah dilelong dan bahawa Floatech telah menjadi syarikat yang muflis dan tidak bernilai. Oleh itu perintah perlaksanaan spesifik tertentu adalah tidak adil. Relif yang sesuai untuk GMOS adalah ganti rugi perlaksanaan spesifik. Ganti rugi dikira dengan mengambil kira faedah yang munasabah dan berkemungkinan yang akan diperoleh oleh GMOS sekiranya 80% kepentingan THHE dalam Floatech pada Julai 2016 dapat dibeli. Mahkamah menerima pendapat pakar bahawa saham Floatech bernilai sekitar USD79.28 juta pada tarikh notis jualan ingkar. Oleh itu, 80% pegangan saham pada tarikh itu bernilai kira-kira USD63.42 juta. Menggunakan kiraan untuk menentukan harga pembelian menurut klausa 8.7(a) SHA, ganti rugi GMOS adalah sebanyak USD63,419,999 (lihat perenggan 143–151).]

Cases referred to

ECM Real Estate AG (in liq), Re [2014] 1 HKC 78 (refd)

Gordon & Breach Science Publishers Ltd, Re [1995] 2 BCLC 189, Ch D (refd)

Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation) [2004] 1 SLR 671, HC (refd)

Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd [2014] 4 MLJ 886, CA (refd)

Mosbert Berhad (in liquidation) v Stella D'Cruz [1985] 2 MLJ 446, SC (refd)

QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor [2017] 8 MLJ 376, HC (refd)

STX Pan Ocean (Hong Kong) Co Ltd (in liquidation), Re [2014] HKCU 2256 (refd)

Seremban General Agency, Ltd, In re the [1923–1924] 3 FMSLR 3, SC (refd) A
Zirceram Ltd (in liquidation), J Paterson Brodie & Son (a firm) and another, Re v Zirceram Ltd (in liquidation) [2000] 1 BCLC 751, Ch D (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 260(4), (5) B
Companies Act 2016 ss 366, 368(2)(a), 439(1)(b), 440, 440(1)(a), (1)(b), (2), (3), 441(1)(b), 443, 443(1)(a), (2), (3), (4), (5), 449, 449(5), (6), (7), (8), (9), 451(2), 464(1), (2)(d), 465(1)(a)

David Thomas Mathews (with Olivia Loh, Lai Ann Xing and Koh Jo Vin) (Mathews Hun Lachimanan) for the plaintiffs. C
Mark Ho (with Eldarius Yong and Milcah Yeo) (Chellam Wong) for the defendants.

Ong Chee Kwan J:

D

INTRODUCTION

[1] This judgment deals with both Originating Summons No WA-24NCC-574–10 of 2023('OS 574') and No WA-24NCC-582–10 of 2023('OS 582'). E

[2] OS 574 concerns TH Heavy Engineering Bhd ('THHE'), a company under creditors' voluntary liquidation ('CVL'). It is not disputed that the plaintiffs in OS 574 namely, Globalmariner Offshore Services Sdn Bhd ('GMOS'), Blackstone Technology Sdn Bhd ('BTSB') and Bynac Sdn Bhd ('DSB'), are all creditors of THHE. F

[3] On or about 8 September 2023, THHE acting through its Board of Directors, commenced a creditors' voluntary liquidation process and appointed Mr Andrew Heng and Mr Ashvin Mahendran as the interim liquidators of THHE. This voluntary winding up process is challenged by the plaintiffs. G

[4] OS 582 concerns THHE Fabricators Sdn Bhd ('TH FAB'), the wholly owned subsidiary of THHE and a company under members' voluntary liquidation ('MVL'). It is also not disputed that the plaintiffs in OS 582, namely BTSB and DSB, are all creditors of TH FAB. H

[5] On 6 September 2023, the sole member of TH FAB, namely THHE (being the holding company), resolved to voluntarily wind up TH FAB and appointed Mr Andrew Heng and Mr Ashvin Mahendran as the liquidators of TH FAB. As with THHE, the plaintiffs also challenged the voluntary liquidation of TH FAB. I

[6] The issues and facts arising in OS 574 and OS 582 are substantially the same and overlap with one another. In both proceedings, the plaintiffs (creditors) seek leave of the court to commence legal action or proceedings against the respective companies and their current liquidators. The applications are premised on s 451(2) of the Companies Act 2016 ('the CA 2016') relevant to companies under voluntary winding up, which provides:

> After the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

[7] The purpose of the plaintiffs pursuing the applications for leave to commence legal proceedings against the defendants in OS 574 and OS 582 is to seek, inter alia, orders that THHE and TH FAB be wound up *compulsorily* by the court and for the appointment of independent liquidators by the court in place of Mr Andrew Heng and Mr Ashvin Mahendran.

[8] The plaintiffs' contention is that there are very compelling reasons why the voluntary liquidation regime is wholly unsuitable and that THHE and TH FAB ought instead, to be compulsorily wound up under the control and supervision the court.

[9] As regards the prayer for leave to commence action against both Mr Andrew Heng and Mr Ashvin Mahendran, the grounds relied on are that they are unfit to act as liquidators and should not be allowed to helm the liquidation or be further involved in the affairs and undertakings of THHE and TH FAB. However, in the course of the oral submissions, learned counsel for the plaintiffs informed this court that he would *not* proceed with the leave application against the liquidators.

[10] Accordingly, this court had proceeded to hear and determine only the question whether leave ought to be given to the plaintiffs to commence proceedings to compulsorily wind up of THHE and TH FAB.

[11] In this regard, there is no dispute that this court may order the compulsory winding up of a company notwithstanding that the company is already in voluntary liquidation. Section 464(1) of the CA 2016 provides:

> A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the petition of any one or more of the following: ...

[12] It is the plaintiffs' case that there is sufficient prima facie evidence shown in these proceedings to warrant the grant of leave to the plaintiffs to pursue the legal actions, on account of the following factors:

(a) the need for an independent inquiry and investigation into the affairs of the companies;

(b) the need for an independent liquidator under the supervision of the court; and

(c) the views of the plaintiffs as majority creditors in value in THHE or as independent minority creditors in TH FAB.

[13] After submissions of counsel, I granted the plaintiffs leave to commence the action to compulsorily wind up THHE and TH FAB and I set out below my grounds for the same.

BACKGROUND FACTS

[14] THHE was previously a public company listed on Bursa Malaysia. It is an investment holding company involved in the business of fabrication of oil and gas structures, construction services and management services.

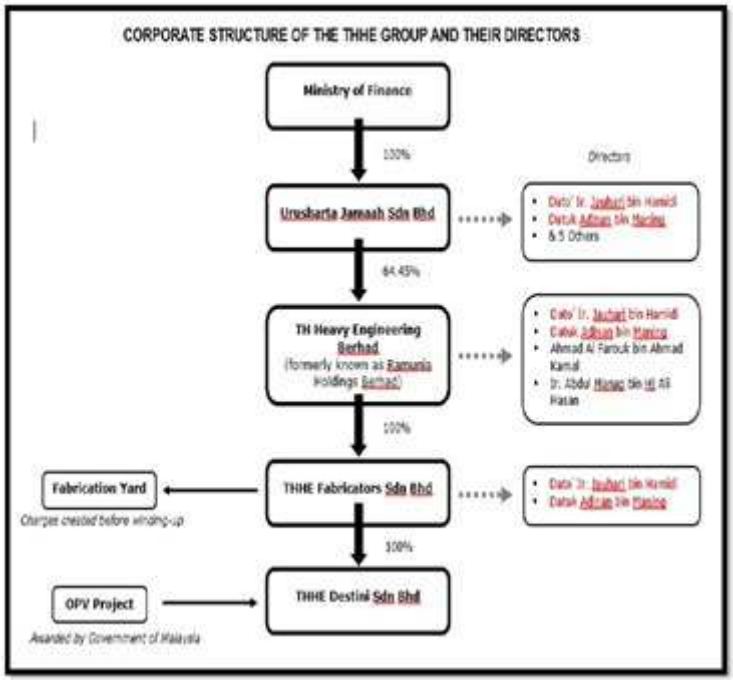
[15] The largest shareholder of THHE is Urusharta Jamaah Sdn Bhd ('UJSB'). UJSB is a special purpose asset management company set up by the Ministry of Finance with a ten-year mandate to manage underperforming investments transferred from Lembaga Tabung Haji ('LTH') in late 2018.

[16] On 28 April 2017, THHE was classified as a PN17 affected listed issuer. On 5 September 2022, it was delisted by Bursa Malaysia after it repeatedly failed to come up with an acceptable regularisation plan, despite being allowed no less than eight extensions in a span of five years.

[17] TH FAB is a wholly owned subsidiary of THHE. As the substantial shareholder of THHE, UJSB is the ultimate holding company of TH FAB.

[18] It is not disputed that UJSB has ultimate control over THHE and TH FAB by reason of common directors and officers on the Board of THHE and TH FAB. In running and managing the businesses of the companies, the directors and officers of these companies were privy to the transactions and decision-making process at each level of the companies.

[19] For ease of reference, set out below is a simplified diagram of the corporate structure of the THHE Group and their directors.



[20] TH FAB is regarded as the *jewel in the crown* of THHE in that:

(a) it holds the most valuable asset of the THHE Group, ie a Fabrication Yard located at Pulau Indah, Port Klang; and

(b) the core businesses of the THHE Group were also undertaken through TH FAB. It has been said the business and survival of THHE were heavily dependent on TH FAB.

[21] On 18 January 2017, THHE, through TH FAB, had secured the 'OPV Project' from the Government of Malaysia worth RM738.9m. The OPV Project entailed the building, supply and delivery of three offshore petrol vessels for the Malaysian Maritime Enforcement Agency ('MMEA'). The vessels were to be delivered in stages with all three units completed within 3 1/2 years. (As a side note, it bears stating that despite securing the lucrative OPV Project, THHE could not put up a regularisation plan for Bursa's approval).

[22] For clarity, the OPV Project was awarded to THHE Destini Sdn Bhd ('TDSB'), originally a joint venture between TH FAB and Destini Shipbuilding and Engineering Sdn Bhd ('Destini'). However, sometime in 2021, TH FAB took over all of Destini's share in TDSB resulting in TDSB

becoming the wholly owned subsidiary of TH FAB. Since then, the entire OPV Project has been taken over by TH FAB and under the control of THHE, and ultimately UJSB.

[23] The undertaking of the entire OPV Project by THHE/TH FAB in 2021 is noteworthy. It portrayed that THHE/TH FAB had the capability to complete the entire OPV Project on time and within cost.

THHE GROUP'S FINANCIAL PROBLEMS

[24] Yet however, the THHE Group as a whole, including TH FAB, constantly struggled with financial difficulties. This is apparent in the multiple debt restructuring exercises undertaken by them in 2010, 2017 and their most recent attempt in 2023.

The 2017 scheme

[25] Of significance is the statutory scheme of arrangement undertaken sometime in 2017. In early 2017, the THHE Group claimed that they were facing financial difficulties due to the significant deterioration of their financials.

[26] A number of companies under the Group, including THHE and TH FAB, applied to the Kuala Lumpur High Court to put forward a statutory scheme of arrangement with their creditors ('2017 scheme').

[27] Notably, Ferrier Hodgson was appointed as the scheme advisors. Mr Andrew Heng and Mr Ashvin Mahendran, who were attached with Ferrier Hodgson at that time, were involved in advising the companies on the scheme.

[28] On 6 February 2018, the Kuala Lumpur High Court sanctioned the 2017 scheme. Briefly, the 2017 scheme incorporated the following repayment plan to the unsecured creditors of THHE and TH FAB:

(a) the debts of the unsecured creditors would be reduced by 50%;

(b) the balance outstanding was to be settled:

  (i) partly in cash settlement; and

  (ii) partly by way of issuance of new Islamic Irredeemable Convertible Preference Shares ('ICPS-i') in THHE.

(c) moving forward in time, THHE and TH FAB managed only to make part settlement in cash. They failed to discharge their liabilities on the issuance of the ICPS-i to the 2017 scheme creditors. Their failure became absolute when THHE was de-listed on 5 September 2022; and

(d) the compromised claims of the unsecured creditors under the 2017 scheme remain unsatisfied. The plaintiffs in OS 574 were creditors of THHE under the 2017 scheme and the plaintiffs in OS 582 were creditors of TH FAB under the 2017 scheme.

Continuous qualification of audit by independent auditors

[29] The background factual matrix surrounding the 2017 scheme is especially relevant towards properly appreciating the plaintiffs' current grievances and concerns, as creditors of THHE and TH FAB. Particularly, concerning the veracity and accuracy of the companies' accounts and financial statements. The reliability of the companies' books and accounts has been continuously called into question since 2017.

[30] Notably in 2017, the independent auditors for the THHE Group (Deloitte PLT) had given a disclaimer of opinion on their audit of the companies' financial statements for FYE 31 December 2016, stating amongst others that:

(a) there were multiple uncertainties which cast significant doubt on the ability of THHE and the Group to continue as going concerns;

(b) they (the auditors) were not able to obtain sufficient appropriate audit evidence from the companies to provide a basis for an audit opinion; and

(c) they were not able to ascertain the completeness of the recorded liabilities and related contingent liabilities of the companies.

[31] For each and every subsequent financial year thereafter up until the latest accounts for FYE 31 December 2022, THHE's independent auditors have continuously qualified their audit and disclaimed their opinion on the companies' financial statements. They have consistently stated that they have not been able to obtain sufficient and appropriate audit evidence to provide a basis for an audit opinion on the companies' financial statements.

[32] In THHE's most recent Directors' Report and Financial Statements for FYE 31 December 2022, their independent auditors (UHY) further attributed their disclaimer of audit opinion to numerous issues, including:

(a) unresolved matters from previous years, arising from:

(i) uncertainties which cast doubt on the companies as going concerns;

(ii) inability to ascertain recoverability of investments and amounts due from subsidiaries; and

(iii) deviation from reporting standards.

(b) the Group's substantial current liabilities exceeding current assets by RM687.3m;

(c) the Group's inability to discharge their liabilities under the 2017 scheme;

(d) the auditors' inability to determine whether THHE's investments in subsidiaries and the amounts due from the subsidiaries were fairly stated;

(e) the auditors' inability to determine whether the Group's consolidated statement of financial position were fairly stated; and

(f) the auditors' inability to satisfy themselves on the means of valuing the land and buildings (which included the Fabrication Yard).

[33] What is most concerning to the plaintiffs arising from the auditors' report is the report on legal and regulatory requirements, in that:

(a) the accounting and other records were found not to have been properly kept in accordance with the Companies Act;

(b) they (the auditors) were unable to report whether they were satisfied with the financial statements of the subsidiary companies due to the existence of the disclaimer of opinion by auditors for those subsidiary companies; and

(c) they (the auditors) were unable to obtain all information and explanations that they required.

Recent loans, debts and liabilities created and assets further encumbered

[34] Notwithstanding the implementation of a court sanctioned corporate rescue mechanism in 2017, THHE and TH FAB could not get out of their financial predicament. They had instead spiraled deeper into debts.

[35] Between October 2022 to March 2023, the following media reports on THHE were alarming:

(a) THHE had yet to deliver any of the vessels to MMEA;

(b) the late delivery of the vessels has prompted an investigation by the Public Accounts Committee (PAC) in September 2022;

(c) in January 2023, the Government of Malaysia announced that they would be injecting an additional RM152.6m loan to help with the completion to the OPV Project. This additional loan is over and beyond the contract sum of RM738.9m to be paid for the vessels; and

(d) the Prime Minister of Malaysia recognised that there may be some weaknesses in the implementation of the project and possible misuse of power.

[36] It is noteworthy to mention at this juncture, that the affidavits filed by THHE and TH FAB in the current proceedings (OS 574 and OS 582) revealed some details about the additional RM152.6m loan from the Government. The true picture however remains unclear.

[37] For instance, it would appear that the loan from the Government was not just meant to use as the working capital for the OPV Project but to also repay outstanding loans owing by TH FAB to creditors, including a purported 'bridging financing facility' said to have been granted by UJSB to TH FAB.

[38] This purported 'bridging financing facility' does not appear to be recorded anywhere in the accounting books and records of THHE or TH FAB. Neither was it referred nor highlighted in the proposed 2023 scheme (which will be alluded to below). No details and information about the purported facility were given or made known until challenged by the plaintiffs in these proceedings.

JUDGMENT OF USD63.4M (RM288.7M) AGAINST THHE ON 21 JULY 2023

[39] After its delisting in September 2022, THHE and its subsidiaries did not take immediate steps to address their outstanding liabilities arising from payment *via* the ICPS-i shares.

[40] In the meantime in July 2023, GMOS was about to receive a decision of the court after a long drawn trial with THHE in Kuala Lumpur High Court Suit No WA-22NCC-374–11 of 2016 ('Suit 374').

[41] In Suit 374, GMOS had sought specific performance and or damages against THHE arising from the breach of a shareholders agreement. On 21 July 2023, the High Court *inter alia* awarded damages in favour of GMOS in the sum of USD63,419,999 (equivalent to RM288,719,545.45) ('judgment') and dismissed THHE's counterclaim with costs of RM800,000 to GMOS.

[42] Resulting from the judgment and along with outstanding liabilities to GMOS under the 2017 scheme, GMOS became the largest creditor of THHE in the value of 74.35%. It is by far the largest creditor of the THHE Group.

[43] It ought to be mentioned that just before the decision of Suit 374 was scheduled to be delivered, the plaintiffs came to know that there were plans by THHE and TH FAB to apply to court for another statutory scheme of arrangement and a restraining order in aid thereof.

[44] There were concerns that the procurement of a restraining order ex

parte was intended to thwart the delivery of decision in Suit 374. This led to a whole host of exchange of correspondence between the parties in Suit 374 and the insistence by, inter alios GMOS, to be notified of the intended applications.

[45] After much insistence and the court's directions to THHE to give notice, THHE later represented to the court and the parties that it would only apply for the statutory scheme of arrangement *after* decision is delivered on 21 July 2023.

THE PROPOSED 2023 SCHEME — OS 403 AND OS 409

[46] On 27 July 2023 and 28 July 2023 respectively, THHE and TH FAB filed separate ex parte applications under ss 366 and 368 of the CA 2016 for leave to call a creditors' meeting to propose a new scheme of arrangement ('proposed 2023 scheme') and a restraining order in aid thereof. These were the proceedings in 'OS 403' and 'OS 409'.

[47] As aggrieved creditors, the plaintiffs in OS 574 and OS 582 applied to intervene in OS 403 and OS 409 to challenge the applications, albeit on an opposed ex parte basis. Leave was granted to the plaintiffs to intervene.

[48] In the meantime, GMOS and DSB, in good faith, gave their respective undertakings not to enforce the judgment against THHE in Suit 374, including not to commence any winding up proceedings.

This was to preserve the integrity of OS 403 and OS 409 pending its determination.

Features of the proposed 2023 scheme

[49] Learned counsel for the plaintiffs highlighted several key factors with respect to THHE and TH FAB's proposed 2023 scheme which he said are relevant for the Court's assessment of the conduct and actions of THHE, TH FAB as well as the liquidators and why the plaintiffs need to pursue compulsory winding proceedings.

Key factor No 1 — Proposed 2023 scheme doomed for failure

[50] The proposed 2023 scheme was said to be needed to regularise the current financial position of THHE and the Group. In particular:

(a) according to THHE's own Statement of Assets and Liabilities as at 26July 2023, it had total liabilities of up to RM464.279m owing to unsecured

creditors, including the judgment debt to GMOS;

(b) yet, the scheme does not address the current liabilities of THHE and TH FAB. It selectively and conveniently ignored the judgment debt owing to GMOS. It was obvious that any proposed scheme that did not deal with the judgment and or did not meet the requirement under s 368(2)(a) of the CA 2016 was doomed to fail;

(c) instead, the scheme contemplated the disposal of the Group's main asset, ie, the Fabrication Yard for about RM150m, without taking into account substantial liabilities (including the judgment debt) that would still remain unsatisfied by them; and

(d) in fact, Mr Ashvin Mahendran, the scheme advisor from Baker Tilly, later admitted to the fact that the proposed 2023 scheme could not address the requirements of the CA 2016 and was not viable.

[51] The plaintiffs contended that THHE and TH FAB as well as the scheme advisors knew or would have known of the material impact of the judgment and that the proposed 2023 scheme was not workable to begin with. They nevertheless sought to assert that there was a *bona fide* viable scheme or arrangement to propose to their creditors.

Key factor No 2 — Non-disclosure of financial status

[52] Remarkably, not a single key financial document (eg audited accounts, management accounts, accounting books or records) was produced by THHE or TH FAB to support their need for a scheme, or their so-called financial analysis and figures. Put simply, there was no disclosure of the companies' books and accounts. The net result is that the accounting and financial data alluded to in the cause papers could not be substantiated or verified by reference to any credible evidence.

[53] The concerns arising from the auditors' previous opinions from 2017 that the companies' books and records were not kept in accordance with the Companies Act were amplified by the said non-disclosure, which give rise to greater concerns as to what was and is the true financial condition of the companies and especially their liabilities.

Key factor No 3 — Baker Tilly's material involvement and conflict of interests

[54] As with the 2017 scheme, the proposed 2023 scheme were formulated and devised by or on advice of Baker Tilly.

[55] Mr Andrew Heng's and Mr Ashvin Mahendran's material and deep involvement with the companies were evident, and even to the extent of

affirming affidavits on behalf of the companies in OS 403 and OS 409, and taking advice from the companies' solicitors. A

Key factor No 4 — Intended disposal of major assets to related companies

[56] Pertinently, the proposed 2023 scheme envisaged the sale of the two major and income generating assets of the Group as attempts to raise funds. They were: B

(a) the intended disposal of Fabrication Yard to UJSB, the ultimate shareholder and holding company, for RM150m (forced sale value); and C

(b) the intended disposal of TDSB (the company awarded with the OPV Project) to UJSB.

[57] The aforesaid suggests that the scheme envisaged the transfer of the main and valuable assets of THHE and TH FAB to UJSB. Putting aside the inability of any sale proceeds from these assets to meaningfully settle or compromise the claims of the creditors: D

(a) the proposed 2023 scheme would have completely denuded the THHE Group of their only revenue generating assets and thereby rendering it completely unable to carry on as going concerns; and E

(b) the proposed 2023 scheme would have seen those revenue generating assets preferentially sectionalised in favour of its shareholder or controlling company, and notably, out of the creditors' reach. F

WITHDRAWAL OF OS 403 AND OS 409

[58] Before the substantive applications in OS 403 and OS 409 could be fully heard orally (but after comprehensive written submissions have been filed), THHE and TH FAB surprised the court and the plaintiffs on 11 September 2023(which was the day for continued oral submissions by counsel) that they wished to withdraw OS 403 and OS 409. Only when pressed for an explanation, was it revealed by counsel for THHE and TH FAB that THHE and the Group had already commenced voluntary liquidation, rendering OS 403 and OS 409 academic. G H

[59] Directions were then given by the court for THHE and TH FAB to put in formal applications to discontinue, which applications were allowed on 30 November 2023. The decisions are currently pending appeal. I

[60] What is pertinent from the withdrawal applications was the reason given by THHE and TH FAB in commencing the voluntary winding up process. It was averred that the proposed 2023 scheme was no longer viable

A because of the judgment obtained by GMOS.

[61] This was notwithstanding the fact that the judgment and its impact was known to THHE and TH FAB at all times and that the proposed 2023 scheme was filed after the judgment.

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[62] What is even more concerning were their decisions to move with voluntary liquidation whilst OS 403 and OS 409 were still pending. Their decision went against the very basis for their applications in OS 403 and OS 409, namely, to restructure their debts and alleviate the risk of being wound up.

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[63] It is unsurprising that the plaintiffs contended in OS 574 and OS 582 that the applications in OS 403 and OS 409 were not filed bona fide to present a viable scheme to their creditors, but to prevent their creditors from pursuing a compulsory winding up or execution proceedings.

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[64] The affidavits for the withdrawal applications were all affirmed by Mr Ashvin Mahendran on behalf of the companies, and he has sought to defend the actions of the Directors and their decisions in winding up the companies voluntarily.

E

CREATION OF SECURITIES, CHARGES AND DEBTS BEFORE THE VOLUNTARY LIQUIDATION

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[65] Very significantly, between March to August 2023, in the months leading up to the filing of OS 403 and OS 409 and to the liquidation of the companies, unbeknownst to the plaintiffs, steps were taken to encumber the assets of the companies, at a time when the companies were in fact, insolvent.

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[66] These included:

(a) the entry of a loan transaction by TH FAB with the Government of Malaysia on 27 March 2023 with the intention to encumber the assets of TH FAB;

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(b) the creation of various fixed and floating charges and securities on 27 March 2023 in favour of the Government of Malaysia, represented by the Ministry of Finance over the assets of THHE and TH FAB. The Ministry of Finance is essentially the ultimate owner of UJSB and THHE; and

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(c) the lodgement of a National Land Code charge over the Fabrication Yard on 28 August 2023 in favour of the Government of Malaysia, just days before TH FAB went into members' voluntary liquidation.

[67] All these were created or transacted within a span of six months before the winding up of THHE and TH FAB. The plaintiffs contended that when viewed with:

(a) the timing of the applications in OS 403 and OS 409 and their intention to seek a restraining order to prevent execution proceedings;

(b) the intention under the proposed 2023 scheme to extract out and place the two major income generating assets in the hands of UJSB;

(c) the securitisation of the assets selectively in favour of certain creditors;

(d) the timing of the voluntary liquidation occurring immediately after the creation of the NLC charge over the Fabrication Yard; and

(e) the withdrawal of OS 403 and OS 409 only after the companies were wound up voluntarily;

these are signs that the companies had motives to sectionalise and ring-fence the assets of the companies from the hands of the creditors, that they had pre-planned the proposed schemes and voluntary winding up to leave the unsecured creditors with nothing and to allow their choice of liquidators to take charge of the process.

[68] The choice of appointing Mr Andrew Heng and Mr Ashvin Mahendran as the Interim liquidators of THHE and liquidators of TH FAB, both of whom were significantly involved in the unsuccessful 2017 scheme and still-born proposed 2023 scheme was alarming. Equally alarming is the fact that both Mr Andrew Heng and Mr Ashvin Mahendran had deemed it fit to accept the appointments.

MEMBERS VOLUNTARY WINDING UP OF TH FAB

[69] TH FAB was said to be wound up by way of members' voluntarily liquidation ('MVL') through a special resolution passed by its sole member, THHE on 6 September 2023.

[70] Crucially, when this happened, OS 409 was still pending in court where the company had proceeded on the basis that its financial obligations needed to be restructured in order to continue as a going concern.

[71] The decision to wind up TH FAB was said to have been made 'after careful deliberation' by the Board of TH FAB and in consultation with professional legal and financial consultants.

A CREDITORS VOLUNTARY WINDING UP OF THHE

[72] Meanwhile on 8 September 2023, just two days after the winding up of its subsidiary, TH FAB, THHE acting through its Directors, commenced the voluntarily winding up process of THHE by way of CVL.

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[73] Again, when this happened, OS 403 filed by THHE was pending in court. Similarly, it was professed that the decision to commence a creditors' voluntary winding up was made by the Board of THHE after careful deliberation.

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[74] Put simply, by a sleight of hand, THHE and TH FAB had subverted their own pending proceedings in OS 403 and OS 409.

D CREDITORS' MEETING OF THHE

[75] On the morning of 4 October 2023, the shareholders of THHE at the meeting of members resolved to wind up THHE voluntarily and Mr Andrew Heng and Mr Ashvin Mahendran were nominated as the members' choice of

E liquidators.

[76] On the same day on 4 October 2023, a meeting of creditors was held ('creditors' meeting') where Mr Ashvin Mahendran assumed the position and role of Chairman, whilst Mr Andrew Heng was absent from the meeting.

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[77] There were two THHE Directors who were present at the Creditors' Meeting but they remained silent throughout.

[78] Mr Ashvin Mahendran started the meeting by informing the creditors

G that he was the Chairman and that 14 creditors had appointed him as their proxies. He then read the business of the meeting as found in the notice to the creditors — which were to consider a statement of position of the company's affairs, and *to confirm* his and Mr Andrew Heng's appointment as liquidators. He had wanted also to present THHE's statement of affairs.

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[79] During the meeting, there were some exchanges between Mr Ashvin Mahendran, Mr Mark Ho (THHE's lawyer) and the proxies for GMOS and BTSB. Two main issues were raised:

I (a) on Mr Ashvin Mahendran *unilaterally* assuming the Chairman role when he is neither a creditor nor director. Other processes stipulated in s 449 of the CA 2016 were raised, including the need for the company's director to present the affairs of the company and not deputise someone else to it;

(b) THHE's failure to circulate and give notice of GMOS' proposed nominees for the liquidator position to the other creditors in advance of the Meeting;

(c) Mr Ashvin Mahendran, acting as Chairman, attempted to put up a resolution for his own appointment as liquidator of THHE and through the proxies given to him, vote on it. As the documents subsequently reveal, Mr Ashvin Mahendran was holding proxy forms for a number of THHE related and associated creditors, including TH FAB, UJSB as well as former directors of THHE;

(d) opportunity was then given to Ashvin Mahendran to seek legal advice. He stood down the meeting to seek advice from the company's lawyer, Mr Mark Ho. When the meeting resumed, Mr Ashvin Mahendran unilaterally terminated the meeting, together with Mr Mark Ho. The termination was confusingly said to be an 'adjournment' on the one hand and in the same breath and on the other hand, the meeting was deemed by them to be 'inchoate'. The creditors' attempts to seek clarification were rebuffed and Mr Ashvin Mahendran and Mr Mark Ho left the meeting; and

(e) the creditors present were aggrieved as they were never consulted on the termination of the meeting and neither were they allowed the opportunity to vote on a chairman to conduct the meeting and vote on their choice of liquidator.

[80] A transcript of the creditors' meeting was produced by the plaintiffs, transcribed from audio recordings of the meeting which the plaintiffs submitted is a true and accurate record of events at the creditors' meeting. Whilst learned counsel for THHE and TH FAB questioned the manner in which the recording was done, he did not challenge the contents of the transcript.

[81] The plaintiffs had produced the transcript because the plaintiffs wholly dispute the Minutes of the creditors' meeting prepared by Mr Ashvin Mahendran, which when compared to the transcript, is lacking both in details and inaccurate.

[82] Premised on the above circumstances, the plaintiffs filed the OS 574 and OS 582 for leave to commence a compulsory winding up of THHE and TH FAB.

A COURT'S CONSIDERATIONS

[83] Pursuant to s 451(2) of the CA 2016, leave to commence action or proceedings against the company is required when voluntary winding up has commenced.

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[84] Learned counsel for the plaintiffs submitted that the threshold test for leave which the plaintiffs have to meet is not a high one. The plaintiffs need only to show:

C (a) that they have a prima facie case to pursue the legal action or proceedings; and

(b) that their claim cannot be adequately addressed in the winding up process.

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[85] The aforesaid *prima facie* test is culled from the case of *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 ('Mosbert') at p 447-H where the court held:

E > In short, the court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.

[86] The same test was applied by our courts in *Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd* [2014] 4 MLJ 886 at p 896, [24] ('Mesuntung') and *QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor* [2017] 8 MLJ 376 ('QB Khidmat').

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[87] What amounts to a *prima facie* case at leave stage means that there is a real or serious dispute between the parties which warrants a proceeding to determine the truth of the matter or that the intended action is not bound to fail, frivolous or baseless. As explained in *Mesuntung*, this is akin to dealing with a striking out application:

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H > [27] As to what amounts to *prima facie* in the context of s 226(3) of the Companies Act, in our view is simply whether there is a serious dispute between the litigants which warrant a trial to determine the truth of the combating allegations. It is not unlike the court's approach when dealing with an application to strike out under O 18 r 19 of the Rules of Court 2012 despite the consideration that the liquidator ought not to be burden with wasteful financial resources in defending frivolous legal actions ...

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[88] Learned counsel for the plaintiffs, Mr David Mathew also placed heavy reliance on the judgment by VK Rajah JC (as he then was) in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR

671 at p 684, para [41] ('Korea Asset'), where the learned judge held thus for a prima facie case to be shown:

> ... To my mind, it is consistent with the general taxonomy of the Act and 'leave' principles that *all the applicant has to do at this stage is to satisfy the court that the application is brought bona fide, underpinned by credible facts and is, even without a serious investigation of the factual matrix, capable of succeeding if and when heard. Though this is not a high hurdle to surmount*, the evaluation should in any event be made in the context of certain broad principles, which I shall deal with shortly. It is vital to the integrity of insolvency proceedings that genuine independent creditors can avail themselves of the court's assistance when they do indeed have legitimate grievances.

[89] As to whether the claim can be addressed in the winding up process, the court would usually be guided to see whether claim that is sought to be pursued can be adequately or conveniently dealt within the insolvency regime (see: *QB Khidmat* at p 398, para [72]–[73]).

[90] During oral submissions, I asked both counsel whether, in the case where a party is seeking to commence proceedings to compulsorily wind up a company that is already under a voluntary winding up, the court should still be looking at the prima facie test as enunciated in *Mosbert*, *Mesuntung*, *QB Khidmat* and *Korea Asset*. This is because unlike the usual application for leave to commence proceedings where the intended action is to pursue a particular claim or debt by way of a *separate* proceedings from the winding up proceedings and hence necessitating an evaluation of the 'disputes', in the case where the intended action is to compulsorily wound up the company that is already undergoing voluntary liquidation ie a complete substitution of the voluntary winding up of the company with a compulsory winding up process, it seems to me that the prima facie test is not appropriate or even meaningless.

[91] This is because under s 465(1)(a) and (e) of the CA 2016, the court may order the winding up if the company has by special resolution resolved that the company is to be wound up and or if the company is unable to pay its debts. The fact that the company is already under voluntary winding up, must necessarily mean either the company has by special resolution already resolved that the company is to be wound up (in the case of a members' voluntary winding up) or the company is unable to pay it debts (in the case of a creditors' voluntary winding up). Accordingly, the examination of whether there is a real or serious dispute between the parties which warrants a proceeding to determine the truth of the matter or that the intended action is bona fide, is wholly unnecessary and a foregone conclusion. Similarly, the question whether the claim can or cannot be dealt with adequately in the creditors' voluntary winding up or whether the remedy he seeks can be given to him in a voluntary winding up proceedings is not appropriate for obvious reasons.

[92] It seems to me that in the present case, the court should be looking at a different consideration. In fact, I would venture to state that s 464(2)(d) of the CA 2016 expressly provides for the applicable test. It states thus:

> Notwithstanding anything in subsection (1) —
>
> (d) the Court shall not, where a company is being wound up voluntarily, makes a winding up order unless the Court is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories.

[93] Accordingly, instead of applying the usual prima facie test, this court must be satisfied based on the evidence that the creditors' voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories. This requires a fact-finding exercise to determine if the interests of the creditors or contributories are better protected or served through a compulsory winding up instead of a creditors' voluntary winding up of the company. In this connection, it is my judgment that fair play and commercial morality are important factors to take into account.

[94] Further, even after the condition in s 464(2)(d) is satisfied, the grant of leave to proceed is an exercise of court's discretion, such discretion should however be exercised rationally in the context of the insolvency scheme, guided by broad guidelines distilled from decided cases.

[95] Specifically, in cases where leave is sought to commence compulsory winding up proceedings against a company already in voluntary liquidation, the case of *Korea Asset* considered various factors relevant for allowing a compulsory winding up proceedings to be commenced. These shall now be considered.

Need for independence inquiry

[96] A compulsory liquidation may be ordered so that an investigation which is not only independent but seen to be independent can be made, especially if one senses that impropriety or possible wrongdoing has occurred in the company (see: *Korea Asset,* para [53] to [54] and *Re Zirceram Ltd (in liquidation), J Paterson Brodie & Son (a firm) and another v Zirceram Ltd (in liquidation)* [2000] 1 BCLC 751 ('Re Zirceram Ltd') at p 758, para [25].)

[97] Thus, where there is evidence of some impropriety or possible wrongdoing which establishes a *prima facie* case for an investigation, or sufficient prima facie evidence raising issues which rational creditors could think need investigation, and in which the outcome may be financially favourable for them and if there is some concerns that such independent investigation may not be secured through the voluntary winding up, then this

would go towards showing that a compulsory winding up is more appropriate to a voluntary winding up.

[98] In short, there must not only be done but seen to be done that matters that call for investigation will be investigated impartially, on behalf of the general body of creditors, during the process of compulsory liquidation.

[99] In *Re STX Pan Ocean (Hong Kong) Co Ltd (in liquidation)* [2014] HKCU 2256 ('Re STX Pan Ocean'), G Lam J held as follows:

> 50. The discretion of whether to make a compulsory order or allow a voluntary liquidation to continue is a broad one and unfettered by rules. The discretion must of course be exercised judicially, taking into account all material factors. Precedents are only guide-posts in a case of this sort, as examples of the way in which judges have thought fit in the past to exercise the discretion, providing illumination and guidance rather than rule of law or practice.

[100] The learned judge then set out some guiding principles at para [51] including the court to give regard to the wishes of the majority creditors, where the petitioning creditors rely on the need for investigation in a compulsory winding up, whether the creditors have confidence in the liquidators acting independently and impartially, particularly where wrongdoings by the directors have to be investigated and possibly pursued in litigation and regard to the general principles of fairness and commercial morality.

[101] Similarly, in the case of *In re the Seremban General Agency, Ltd* [1923–1924] 3 FMSLR 3 and *Re Gordon & Breach Science Publishers Ltd* [1995] 2 BCLC 189, a need to carry out investigation by an independent liquidator were accepted as a relevant factor in considering an order to compulsorily wind up a company that is already under a voluntary winding up.

Choice of liquidator(s)

[102] Where the objective of the compulsory liquidation is an investigation into the company's affairs, then the identity of the liquidator is crucial.

[103] In this regard, the liquidator should not be perceived as having had any relationship or nexus with the company nor its shareholders or officers. It is in the public interest that the creditors should have confidence in the independence of liquidators.

[104] Therefore, a court appointed liquidator, being an officer of the court, unlike a voluntary liquidator, may better serve the interests of the creditors. The difference between a court appointed liquidator and a liquidator appointed in a voluntary winding up process is best explained by G Lam J in *Re*

ECM Real Estate AG (in liq) [2014] 1 HKC 78, which I quote:

> [41] The principal difference is explained by *Wynn-Parry Jin Re Phoenix Oil & Transport Co Ltd (No 2)* [1958] Ch 565 at 570 as follows:
>
> > A study of the relevant sections of the Companies Act, 1948, dealing with winding up shows clearly that as regards voluntary winding up the legislature has followed (in pursuance of the policy of previous Companies Acts) a different policy from that laid down in the case of compulsory winding up. The reason is not far to seek. In the case of voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditors' liquidation, the creditors, through their committee of inspection, are in control as against the contributories; while in the case of a members' voluntary winding up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that in both forms of voluntary winding up the court is in the background to be referred to if the necessity should arise. In the case of a winding up by the court, however, different considerations arise. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control.
>
> [42] Although steps in a compulsory winding up are no longer taken under the immediate superintendence of the chief clerk of the judge to whose court the winding up was attached, as they sometimes were in nineteenth century England, the control of the court over such a winding up is still very real and manifested by the fact that the liquidator is appointed by the court (ss 192–194), is to report to the court (s 191), is free to seek directions from the court (s 200), and exercises powers and performs duties delegated to him by the court as an officer of the court and subject to the control of the court (s 226).
>
> [43] A further difference, and one of great practical significance, is that liquidators in a compulsory winding up are subject to a very wide control by the Official Receiver (s 204) including control over the liquidator's accounts (s 203). Liquidators in a voluntary winding up are, in contrast, free from such control.

Wishes of creditors

[105] The court shall also have regard to the wishes of the creditors. However, the views of creditors must be regarded in such a manner that will accord with the general principles of fairness and commercial morality, which underlie insolvency law.

[106] Generally, the court should grant a compulsory winding up order if the majority of the creditors so wish, even if the company is under voluntary liquidation. However, to facilitate fairness and commercial morality, the court should have regard to the views of *independent* creditors in cases where the majority creditors are related to the wound up company or the management of the company. Where inter-company transactions require special scrutiny, the

court may take into account the fact that the creditor is not an independent creditor. This would prevent independent creditors from being left with a strong legitimate sense of grievance.

[107] Thus, in *Re Zirceram Ltd*, Lawrence Collins QC, sitting as a Deputy Judge of the High Court held thus at p 758, para [25]:

> [2] The court may have regard to the general principles of fairness and commercial morality, and the exercise of discretion should not leave substantial independent creditors with a strong legitimate sense of grievance. *Fairness and commercial morality may require that an independent creditor should be able to insist on the company's affairs being scrutinised by the process which follows a compulsory order.*
>
> [3] Inter-group transactions may require special scrutiny is they operate to the prejudice of creditors and the court may take account of the fact that an opposing creditor is not an independent creditor, but an associated company.
>
> [4] A compulsory liquidation may be ordered so that there can be an investigation which is not only independent, but seen to be independent. Even if there is no criticism of the liquidator appointed in the voluntary winding up (a) the fact that associated supporting creditors have gone to great lengths to install, and maintain, him in office, may disqualify him in the eyes of the creditors; (b) the petitioning creditors may view with cynicism any investigation undertaken by a liquidator chosen by the very persons whose conduct is under investigation. (Emphasis added.)

CONDUCT OF THE VOLUNTARY WINDING UP

MVL process of TH FAB

[108] Having set out what I consider to be the law on the applicable test and the relevant factors for the application for leave in the present case, I shall now examine the facts of this case and statutory provisions in the CA 2016 relating to the MVL to give context to the plaintiffs' complaints on the MVL process initiated and proposed by TH FAB.

[109] When a proposal is made to wind up a company under an MVL, the criteria in s 443 of the CA 2016 would have to be fulfilled.

[110] Briefly, the steps to be taken towards a MVL are as follows:

(a) the directors must make a written declaration to the effect that they have inquired into the affairs of the company — see: s 443(1)(a);

(b) the directors must form an opinion at a meeting of directors, that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up (see: s 441(1)(b) *where* a members' voluntary winding up is deemed to have commenced at the time of the passing of the resolution for voluntary winding up);

A (c) the declaration of solvency by the directors shall be made *before* the date on which notices of meeting for the proposal for the winding up are sent to members (see: s 443(2));

(d) a statement of affairs of the company shall be attached to the declaration, with particulars made up to the latest practicable date (see: s 443(3)); and

B

(e) the declaration of solvency by the directors shall have no effect unless the criteria in s 443(4) are met, inter alia, the declaration to be lodged with Registrar by a specific time.

C

[111] In the present case, it appears that on 4 September 2023, the Directors of TH FAB met and made a written Declaration of Solvency that they had inquired into the affairs of the company and came to an opinion that TH FAB would be able to pay its debt in full within 12 months.

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[112] The Directors further attested to the truth and correctness of TH FAB's assets and liabilities as at 30 August 2023 which reflected a purported surplus of RM10.525m.

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[113] The importance in making the declaration of solvency in set out in s 443(5) of the CA 2016. A director who makes a declaration without any reasonable grounds for the opinion that the company will be able to pay its debts in full within 12 months, commits an offence and shall on conviction, be liable to imprisonment or a fine. As such, the affirmation as to the veracity and correctness of the Declaration of Solvency cannot be treated lightly.

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[114] In the present case, just a month prior the Declaration of Solvency, TH FAB made various representations in OS 409 that:

G (a) it was facing financial difficulties and needed a restructuring of its current financial liabilities to continue as a going concern;

(b) without a plan to regularise its financial situation, it would face the possibility of liquidation and a forced sale liquidation scenario would result in a *deficit* of RM28,626,869; and

H

(c) premised on its Statement of Assets and Liabilities as at 26 July 2023, it had a substantial *deficit* of assets of approximately RM29,469,000.

[115] Thus, when the Directors of TH FAB (who had the benefit of advice I from professional legal and financial consultants) declared on 4 September 2023 that TH FAB was able to pay its debts within 12 months, the dramatic increase in the surplus funds reflected in TH FAB's Statement of Assets and Liabilities as at 30 August 2023, and attested to by the Directors, quite understandably becomes highly implausible and dubious.

[116] In a very recent affidavit affirmed by Mr Ashvin Mahendran on 16 January 2024(Encl. 27 in OS 582), he now says that TH FAB is actually insolvent and unable to pay its debts in full within 12 months. Purportedly and amongst others:

(a) TH FAB is now said to owe UJSB a substantial sum of no less than RM63m; and

(b) TH FAB is said to have received 'financial assistance' from UJSB of RM21.6m, incurred on 14 September 2023(post commencement of MVL).

[117] The flippancy with which TH FAB seeks to change the landscape and shift the goal posts by flip-flopping the financial condition of the company seemingly, willy-nilly, is cause for grave concerns and investigation. It casts grave doubts on the books and accounts.

[118] The massive differences in TH FAB's financials and sudden emergence of new liabilities are underscored by the independent auditors' report that the books and accounts were not properly kept, and information was not forthcoming from the management. It renders the financial documents unreliable and gives rise to serious doubts as to whether TH FAB's MVL process was *bona fide* and properly undertaken.

[119] It also raises questions as to the competency of Mr Andrew Heng and Mr Ashvin Mahendran as interim liquidators, who at all material times, since the 2017 scheme, had access and first-hand knowledge of the financial matters and accounting records of the companies.

CVL process of THHE

[120] Moving now to the CVL of THHE, the applicable provisions regulating a CVL are mainly found in s 440 of the CA 2016.

[121] Briefly, the steps to be taken towards a CVL are as follows:

(a) the directors would have to make a statutory declaration that:

  (i) the company cannot by reason of its liabilities continues its business; and

  (ii) a meeting of members and a meeting of creditors have been summoned within 30 days (see: s 440(1)(a) and (b));

(b) the directors would then have to forthwith appoint an interim liquidator *after* the statutory declaration has been lodged with the Registrar and with the Official Receiver (see: s 440(2)); and

A (c) the appointment of the interim liquidator shall only continue for 30 days or unless extended by the Official Receiver or until the appointment of a liquidator, whichever comes first (see: s 440(3)).

B **[122]** In the present case, the Directors of THHE had on 8 September 2023 made a statutory declaration under s 440 of the CA 2016 that THHE could not by reason of its liabilities continue its business and appointed Mr Andrew Heng and Mr Ashvin Mahendran as interim liquidators.

C **[123]** They also proceeded to summon a meeting of members to be held on 4 October 2023 at 10am and a meeting of creditors to be held on 4 October 2023 at 3pm following s 449 of the CA 2016.

D **[124]** Notwithstanding the term 'creditors' voluntary winding up', the decision to voluntarily wind up the company still lies with the company acting through its members. The proposal to wind up is made at the meeting of members and passed by way of special resolution (see: s 439(1)(b) of the CA 2016).

E **[125]** At the meeting of members, the members may nominate a person to be the liquidator of the company (see: s 450(1) of the CA 2016).

F **[126]** However, the appointment of the liquidator by the company (through its members) is not conclusive, as the creditors may at the meeting of creditors, nominate a person to be the liquidator. In this regard, it is significant that where there are competing nominations by the members and the creditors, it is the creditors' choice that prevails (see: s 450(1) and (2)).

G **[127]** Therefore, one key aspect of a creditors' voluntary winding up is the right given to the creditors to nominate a liquidator of their choice and override the choice of the members. Such powers afforded to the creditors in a CVL were intended to protect the creditors' rights and interests in the liquidation process (see: *QB Khidmat* at para [94], [96] and [98]).

H **[128]** As was aptly explained by Mohd Nazlan JC (as he then was) in *QB Khidmat*:

> [126] *A creditors' voluntary winding up is a procedure initiated by a company directly, to voluntarily bring the business to an end, and for that purpose appoint a liquidator to liquidate all its assets. It is not, despite the name, commenced by the creditors.* In essence, if directors of a company cannot sign on a declaration of solvency when considering a members' voluntary winding up, the company ought to rightfully proceed, like the first defendant in the instant case, with a creditors' winding up.
>
> [127] In my view, it certainly cannot be emphasised enough that *the mechanism and*

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process governing a creditors' voluntary winding up or creditors' voluntary liquidation ('CVL') is enacted to protect exactly what it says — the creditors' rights in liquidation, and for that reason the interests of the creditors, collectively, are decidedly at the forefront during this process, for the overarching objective is after all the realisation of company assets and payment of dividend to the creditors.

[128] The various provisions which I have discussed earlier in this judgment are all intended to ensure the CVL process proceeds in a fashion that is not detrimental to the interests of the creditors. *The decision to liquidate is for the members to make, and the only powers available to the creditors are those related to the supervision of the liquidation exercise. And the starting but key point is the power to nominate the liquidator for that process, at the first meeting of the creditors.* (Emphasis added.)

[129] Aside from the power to nominate a liquidator of their choice at the creditors' meeting, the conduct of the creditors' meeting under a CVL is also provided for in s 449 of the CA 2016.

[130] For present purposes, the relevant requirements for the conduct of a meeting of creditors under the CA 2016 may be summarised as follows:

(a) the directors shall cause a full statement of the company's affairs to be laid before the meeting of creditors (see: s 449(5));

(b) one of the directors must be appointed to attend the meeting. Such director appointed and the secretary shall disclose the company's affairs and circumstances leading up to the proposed winding up (see: s 449(6));

(c) the creditors may appoint one of the creditors or the director to preside the meeting (see*:* s 449(7); and

(d) the chairperson will decide whether the meeting has been held at a time and place convenient to the majority in value of the creditors, and if not, the meeting shall lapse and a further meeting shall be summoned by the company as soon as practicable (see: s 449(8) and (9)).

[131] In *QB Khidmat*, the court held that it is absolutely imperative that a company subject to a creditors' voluntary winding up demonstrate the highest level of adherence to the requirements of s 260(4) and (5) of the CA 1965, which are in *pari materia* with ss 449(5) and (6) of the CA 2016 and to the general principles of fairness and morality.

[132] These statutory requirements on the conduct of the creditors' meeting underscore the importance of the rights and interests of the creditors in a CVL. Essentially, the creditors' meeting is to be in the hands of the creditors. The processes laid down in ss 449 and 450 of the CA 2016 were meant to safeguard the rights and interests of the creditors

[133] However, in the present case, the aforesaid safeguards were completely disregarded by THHE, Mr Andrew Heng and Mr Ashvin Mahendran. In particular:

(a) Mr Ashvin Mahendran assumed the role as Chairman when he had no right or locus to do so;

(b) the creditors present were deprived of their right to elect a chairperson for the meeting;

(c) the creditors present were deprived of their right to question about the affairs of the company;

(d) the THHE Directors took no responsibility to present the statement of affairs of the company;

(e) despite prior notice being given by GMOS, GMOS' proposed nominations for the liquidator position were not included as part of the agenda nor circulated to the meeting; and

(f) the creditors' meeting was abruptly terminated without any basis or valid explanation.

[134] The plaintiffs were naturally aggrieved as to how the creditors' meeting was conducted. Their rights and the rights of other creditors present were disregarded and undermined by the defendants, in that:

(a) GMOS was prevented from putting forward their nomination of the liquidators at the creditors' meeting. The creditors were left with the fear that they were prevented from taking control of the meeting and voting on their choice of the liquidator; and

(b) the issues would have easily been resolved by Mr Ashvin Mahendran stepping down and allowing the floor to vote a chairperson. However, Mr Ashvin Mahendran did not want to relinquish his position when he had been entrusted with 14 proxy votes which could determine the status of their appointment as liquidators.

[135] In the latest affidavits affirmed by Mr Ashvin Mahenran in support of encl 28 (OS 574), Mr Ashvin Mahendran has now settled on the position that the meeting was 'inchoate'. However, todate, no attempt has been made to clarify or explain why the meeting was 'inchoate' as asserted.

[136] There is a genuine fear and or concern that by declaring so, Mr Ashvin Mahendran, with the acquiescence of Mr Andrew Heng, were motivated to not allow the meeting to proceed and for the creditors to vote in a liquidator of their choice. There is a perception that both Mr Ashvin Mahendran and Mr Andrew Heng were engaged in self-serving means to engineer the meeting

towards continuing to helm the liquidation exercise. The aforesaid is not a mere emotional and irrational fear given the close nexus and relationship between the THHE Group and both of them, a matter that I will now allude to.

CLOSE NEXUS AND RELATIONSHIP BETWEEN THE THHE GROUP AND THE LIQUIDATORS

[137] Given the role and functions of a liquidator in the liquidation process, it is crucial that the liquidator does not have any nexus with the company, especially if an investigation into the company's affairs are needed.

[138] The circumstances of the present case call for the need to investigate into the affairs of THHE and TH FAB owing to the lack of financial disclosures and evidence of their financial records and dealings, a situation which has been confirmed by their own independent auditors. The constant changes in the financials of the companies raise legitimate concerns that the books and accounts may have been manipulated or manoeuvred for less than legitimate reasons. These include:

(a) the change in TH FAB's deficit position (as at 26 July 2023) to a surplus position (as at 30 August 2023); and

(b) the sudden increase and appearance of inter-company debts and transactions between TH FAB, THHE and UJSB before, during and after the commencement of MVL and CVL of the companies. For example, as between THHE and UJSB, there is a sudden increase in debts owed by THHE to UJSB in the sum of RM42.3m as of 8 September 2023. Prior to that, only RM989,063.01 was said to be owing to UJSB. Also, as between TH FAB and UJSB, the emergence of a 'bridging financing facility' said to be granted by UJSB to TH FAB, details of which do not appear to be recorded anywhere in the accounting books and records of THHE and TH FAB. Further, as between TH FAB and UJSB, the sudden emergence of 'financial assistance' of RM21.6m said to be given by UJSB to TH FAB on 14 September 2023, after the date of commencement of TH FAB's MVL.

[139] All these inter-company debts and transactions are causes for alarm and concern.

[140] In all their purported explanations, the defendants have not provided any credible answers nor produced any credible financial documentary evidence. Instead, they tend to raise more questions than answers.

[141] The series of events leading up the creation of various securities and charges and the emergence of inter-company debts and transactions also give rise to the possibility of the transactions being impugned for being undue or fraudulent preferences.

[142] In this regard:

(a) the procurement of a RM152.6m loan from the Government by TH FAB on 27 March 2023 with the intention to securitise the assets of TH FAB;

(b) the creation of the fixed and floating charges and various other securities and mortgage of TH FAB assets on 27 March 2023;

(c) the creation of a NLC charge over the Fabrication Yard on 28 August 2023; as well as

(d) the newly discovered inter-company transactions prior to and after the respective winding up of THHE and TH FAB,

all require clarity and explanations.

[143] The position is further exacerbated by the fact there are common directors and officer in UJSB, THHE and TH FAB. UJSB has effective control over the management of THHE and TH FAB. It is not possible that that the Directors of UJSB, THHE and or TH FAB can feign ignorance on these inter-company activities.

[144] Because of the aforesaid, I agree with learned counsel for the plaintiffs that Mr Andrew Heng and Mr Ashvin Mahendran cannot act or continue to act as the liquidators for they are clearly in conflict and not independent by virtue of their material relationship and prior involvement as scheme advisors of the companies.

[145] They lacked objectivity and have also displayed biasness in favour of the Directors who appointed them. This is apparent in them:

(a) affirming affidavits on behalf of the companies;

(b) defending the actions of the Directors and the companies, especially concerning the Declaration of Solvency by the TH FAB Directors and the inter-company transactions and debts;

(c) instructing and being advised by the companies' solicitors;

(d) acting in disregard of the creditors' rights and interests and breaching the statutory provisions meant to safeguard the conduct of the meeting of creditors;

(e) attempting to vote themselves in as liquidators through proxy votes and placing their self-interest above the interests of the creditors; and

(f) distorting the events at THHE creditors' meeting in the minutes of meeting they had prepared and signed.

[146] In the result, the plaintiffs have no confidence or trust in Mr Andrew Heng and Mr Ashvin Mahendran acting in the best interest of the creditors. They are certainly not in a position also to undertake any independent investigation into the affairs of the companies.

[147] In this regard, learned counsel for the THHE and TH FSB, Mr Mark Ho contended that the creditors are always in control of the liquidation and can always appoint their own nominated liquidators in place of Mr Andrew Heng and Mr Ashwin Mahendran. As such, there is no reason for a Court compulsory winding up which will only entail further costs and expenses.

[148] Whilst it is true that under s 450(1) and (2) of the CA 2016, the creditors' choice of liquidators will prevail over that of the members, what is of concern to the plaintiffs in this case is their complete lack of confidence that THHE and or TH FAB and or the liquidators in conducting the Creditors Meetings, would do so in an impartial and fair manner such that the creditors' wishes would not be thwarted by any sinister manoeuvring. The manner in which the THHE Creditors Meeting was conducted coupled with the questionable circumstances leading to the commencement of the voluntary winding up of both THHE and TH FAB which suggests that the voluntary liquidation processes were undertaken for ulterior purposes, ie to prevent a compulsory winding up from taking place and putting the liquidation in the hands of the Directors' choice of liquidators, are sufficient grounds for the plaintiffs' fear that the standard of commercial morality that are to be expected of the companies and the liquidators will not be adhered to and satisfied if left to their own devices.

[149] The circumstances in this case call into question the conduct of the Directors and officers of not just THHE and TH FAB, but also the conduct of UJSB and the scheme advisors, Baker Tilly. In so far as TH FAB is concerned, recent events also suggest that inter-company debts and transactions are now emerging to place UJSB, THHE and related companies as the majority creditors in value. Their status as majority creditors are also questionable and the plaintiffs (BTSB and DSB) as well as other creditors could very well be side-lined during the process.

[150] In light of the foregoing, the plaintiffs should be entitled to seek the court's intervention and have the affairs of THHE and TH FAB investigated by

a liquidator who is not merely independent but can be seen to be independent, under a compulsory winding up.

[151] The plaintiffs in OS 574 are collectively the largest independent creditors of THHE. Their views are relevant. As it stands, they wish for a compulsory winding up order to be made against THHE and independent liquidators to be appointed by the court.

[152] Although the plaintiffs in OS 582 are not the largest creditors of TH FAB, they are certainly independent minority creditors of TH FAB. Their views are also relevant. They too wish for a compulsory winding up order to be made against TH FAB and separate independent liquidators to be appointed by the court.

[153] The fact that there may be more costs incurred under the court ordered compulsory winding up is not a matter that is not contemplated by the creditors. As the creditors of the companies, it is in their interests to keep the costs in check. However, given that there is every and real likelihood that the voluntary process will not be fairly conducted, the increase costs to be incurred in the compulsory winding up route and the appointment of a court appointed liquidator is a price that the plaintiffs would appear willing to pay. In any case, such additional costs and expenses are best left to the majority of the creditors to decide.

CONCLUSION

[154] In the circumstances, this court grants an order in terms of encl 1 in OS 574 and OS 582.

GMOS awarded RM288,719,545.45 (the equivalent of USD63,419,999 as at 21 July 2023) as damages in lieu of specific performance and THHE's counterclaim dismissed.

Reported by Ashok Kumar